UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION FIVE

WASHINGTON SHUTTLE, INC. D/B/A SUPERSHUTTLE WASHINGTON, DC¹

Employer

and Case 05-RC-112829

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1994, MCGEO²

Petitioner

DECISION AND ORDER

I. INTRODUCTION³

On September 9, 2013, Petitioner filed the petition in the instant case.⁴ Petitioner seeks to represent a unit of "[a]ll full-time Shuttle Drivers including relief drivers employed by the Employer serving Reagan National and Dulles Airport" but excluding "[d]ispatchers, guards, and supervisors as defined in the [National Labor Relations] Act." A hearing was

¹ The name of SuperShuttle appears as amended at hearing.

² The name of the Petitioner appears as amended at hearing.

³ Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds that during the past 12 months, a representative period, SuperShuttle purchased and received goods and services at its Reagan National Airport and Dulles International Airport facilities goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Virginia. Per the parties' stipulation at hearing, the undersigned further finds that SuperShuttle is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. No question affecting commerce exists concerning the representation of certain employees of SuperShuttle within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

⁴ Petitioner had originally filed a petition in Case 05-RC-111971 seeking to represent full-time Shuttle Drivers only. Petitioner withdrew that petition on September 5, 2013, and filed the petition in this case on September 9, 2013. The new petition includes relief drivers.

⁵ The two aforementioned airports are henceforth correctly named as Ronald Reagan Washington National Airport and Washington Dulles International Airport.

held before a hearing officer on September 17-18, 2013.⁶ A timely brief from SuperShuttle has been received and considered.⁷

Washington Shuttle, Inc., d/b/a SuperShuttle Washington, DC (SuperShuttle), is a shared-ride airport shuttle service providing, through franchisees, door-to-door ground transportation to and from Ronald Reagan Washington National Airport and Washington Dulles International Airport. SuperShuttle argues the petition should be dismissed because the franchisees are independent contractors, not employees within the meaning of Section 2(3) of the Act. Additionally, SuperShuttle contends that even if the franchisees are not independent contractors, they are Section 2(11) supervisors because they have the authority to hire, assign, reward, and/or discharge relief drivers, using their independent judgment. There are approximately 92 franchisees and approximately 63 relief drivers in the petitioned-for unit.

Based on the evidence presented at hearing, I find it unnecessary to resolve the issue of independent contractor status. Even if I assume franchisees are not independent contractors and are Section 2(3) employees of SuperShuttle, franchisees would nevertheless be beyond the jurisdiction of the Board as Section 2(11) supervisors. I find the franchisees possess the authority of supervisors under Section 2(11) to hire, assign, reward, and/or discharge relief drivers, using their independent judgment. Given that a majority of individuals in the petitioned-for unit are supervisors, and Petitioner failed to indicate it would proceed to an election in a unit limited to relief drivers, I shall dismiss the petition.

⁶ The hearing officer's rulings are free from prejudicial error and are affirmed.

⁷ Petitioner failed to submit a timely brief.

⁸ Under SuperShuttle's Unit Franchise Operations Manual (Manual) states, "[e]ach of the operating policies and procedures specified in this Manual may be delegated in part or in whole by you to other Operators of your vehicle." *See* J1D in Case 05-RC-112774. Nevertheless, while franchisees may delegate part, or all, of their driving to relief drivers, franchisees generally opt to operate as drivers of their vans, even if they share that responsibility with a relief driver. The franchisees are the "shuttle drivers" referenced in the Petition.

II. FACTUAL SUMMARY

SuperShuttle is in the business of selling franchises to individuals or corporate entities to provide shared-ride shuttle service to and from Ronald Reagan Washington National Airport and Washington Dulles International Airport ("the airports") utilizing SuperShuttle's reservation system and services. SuperShuttle does not provide any shared-ride services. Such services are provided solely through franchisees and, if applicable, relief drivers the franchisees individually elect to utilize to assist them in providing the transportation service.

SuperShuttle has two concession contracts – one for each of the above-named airports – with the Metropolitan Washington Airport Authority (MWAA) for the right to operate scheduled shared-ride ground transportation service to and from the airports. These lease and concession contracts regulate and set forth numerous detailed requirements in areas including customer service, passenger fares, vehicle standards, vehicle appearance, vehicle features, vehicle maintenance, vehicle inspection, record keeping, driver licensure, driver cell phone use, driver attire, vehicle insurance, a requirement to meet customer demand, revenue sharing, marketing limits, information for customers, and customer waiting time limits. In turn, SuperShuttle, under the contracts, sells unit franchises to provide shared-ride shuttle services using SuperShuttle's reservation system. The unit franchise agreement (UFA) contains the requirements set forth in the lease and concession contracts, as well as the additional obligations SuperShuttle imposes as the franchisor. SuperShuttle and the franchisees are subject to heavy regulation by state and federal laws. In particular, SuperShuttle and the franchisees are subject to federal, state, and airport regulations put forth by the Department of Transportation (DOT), the Washington Metropolitan Area Transit Commission (WMATC), and MWAA.

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⁹ Since 2010, SuperShuttle has required new franchises to be purchased by an incorporated entity; franchisee drivers have been free to choose their preferred method of incorporation, and some drivers who purchased their franchises prior to 2010 have been incorporating.

A franchisee may purchase one or more ten-year franchises from SuperShuttle at a cost of \$25,000 to \$35,000 per franchise. Franchisees are not limited in how many franchises they may own, and several franchisees own multiple franchises. Franchisees generally pay a \$25,000 franchise fee if they purchase their franchise directly from SuperShuttle, or a negotiated sum if purchased directly from a franchisee. There are currently 120 franchises held by 92 franchisees.

A franchisee may pay the full amount at signing or finance the amount. Many franchisees finance the amount through financing with SuperShuttle and have a weekly payment deducted from their earnings during a weekly "cash-out" process. The franchisees that opt to finance through SuperShuttle execute a promissory note for some, or all, of the franchise fee when setting up financing, which follows a five- or seven-year term. Franchisees, however, are not required to finance their purchase through SuperShuttle, and may elect to use their own financial institution.

Franchisees may lose their franchise for failing to comply with the terms of their UFA, or with applicable regulations and laws. Generally, though, SuperShuttle will first give a franchisee the opportunity to correct any compliance issues before moving to terminate their franchise agreement. Franchisees that lose their franchise are not compensated for any money they have already invested in the franchise.

Franchises are transferable if SuperShuttle is given the right of first refusal to purchase the franchise and if the proposed buyer meets the requirements for becoming a franchisee (such as having a valid driver's license and a clean driving record, possessing medical certification cards, and passing a background check). The qualification process for prospective franchisees is based upon MWAA and WMATC regulations. There is no requirement in the UFA that franchisees lower their asking price if SuperShuttle wishes to buy

the franchise. In 2011, SuperShuttle introduced the Franchise Resale Opportunity Program (FROP). Any franchisee who seeks to sell his/her franchise and wants SuperShuttle's assistance may place their franchise on a list. Franchises on the list are then offered for sale to any prospective franchisee prior to the prospective franchisee being offered one of SuperShuttle's own franchises. SuperShuttle receives part of the revenue of the sale for facilitating it. However, franchisees who wish to sell their franchises are not obligated to use the FROP.

Each franchisee is responsible for acquiring, insuring, and maintaining a van that complies with the UFA. Franchisees may purchase or lease a van on their own, or SuperShuttle will assist them in leasing a van through Blue Van Leasing. Franchisees also may arrange with SuperShuttle to have the lease payments deducted from their revenues on a weekly basis. Franchisees may receive assistance from SuperShuttle to obtain insurance for their vans, and franchisees may arrange to have SuperShuttle deduct and remit the premiums from their revenues to the insurance company. Franchisees must customize their vans to meet MWAA and WMATC requirements, covering such modifications as the color of the van, the posting of decals, and the placement of Plexiglas separators. Franchisees may use a SuperShuttle-recommended vendor, or they may use a vendor of their own choosing for customization.

Franchisees may choose to operate their franchise as a 14-hour AM franchise, a 14-hour PM franchise, or a 24-hour franchise. Franchisees pay a system fee, which costs \$375 a week for 24-hour access, or \$250 a week for AM or PM access. This gives a franchisee access to SuperShuttle's dispatch system and a mobile data terminal (MDT) communication device. Through the use of SuperShuttle's MDT device, franchisees are alerted to inbound reservations of people wanting to be driven to the airports, and they can bid or pass on those reservations if they are within a certain mile radius of the customers as early as the prior evening.

Also, franchisees can bid or pass on outbound reservations while at the airports' holding lots prior to getting to the curb. Franchisees are generally free to choose whether to bid or pass on any reservation sent to them on their MDT devices. There are no repercussions for opting to pass on a particular reservation, provided the franchisee has not already accepted the reservation or moved his or her van to the pickup curb at the airport. Franchisees consider factors such as the dollar value of a trip, location, pick-up time, hours worked, and revenue generated when deciding on whether to accept a reservation. Not only may franchisees bid or pass on any given reservation, franchisees are free to choose whether to work on any given day; franchisees who opt to stay home do not have to provide advance notice to SuperShuttle.

In addition to the system fee, franchisees are responsible for paying a license fee that is 25% of all gross revenues generated by the franchise, as well as an airport concession fee of \$93 per week for a 24-hour grant, or \$62 a week for an AM or PM grant. Franchisees must also pay a property tax assessed on their vehicle. All of the franchisees' fees are generally charged either weekly or monthly, regardless of whether a franchisee's van is in operation. However, regarding the system fee, a franchisee may be excused from that fee if the franchise is not in operation during a given week.

Each week the franchisees will cash out for the jobs they performed and the money they received for the prior week. SuperShuttle will deduct any monies a franchisee owes to SuperShuttle for franchise fees and interest, insurance, vehicle lease payments and interest, system fees, and/or any other miscellaneous costs or fees. SuperShuttle also will deduct its portion of the revenues each franchisee is required to remit to SuperShuttle under the terms of his or her UFA as well as monies owed to MWAA under the lease and concession agreements and the UFA. After these deductions are made, SuperShuttle will issue the franchisee a reimbursement or reconciliation check. SuperShuttle does not deduct any federal or state withholding or other employment-related taxes

from the check, and it does not pay unemployment insurance or workers' compensation insurance for these franchisees. As previously stated, the franchisees are solely responsible for all costs associated with operating a franchise (e.g., purchase or lease payments, insurance, gasoline, tolls, and vehicle maintenance and repairs).

Franchisees may also use their vans for personal and non-competing business purposes. Franchisees may use their vans for personal use, such as for buying groceries, transporting their families, and recreational activities. Franchisees may also use their vans for charter purposes provided the charters are not in competition with SuperShuttle for airport transportation. Franchisees do not need SuperShuttle's permission for such independent, non-competing charters, or for regular personal use. To that end, franchisees may also keep their van at home.

Under the UFA, each franchisee is permitted to utilize one or more substitute operators, more commonly referred to as relief drivers. Presently, there are over 63 relief drivers hired by 97 franchisees. The UFA requires that the franchisees notify SuperShuttle of any relief driver(s) being used, as well as evidence that each relief driver meets all the necessary training, certification, and licensure requirements to operate the franchisee's van. Other than verifying that the relief drivers meet these requirements, SuperShuttle has no other involvement in who the franchisee utilizes as a relief driver. Any issues or problems SuperShuttle has with a relief driver, such as failing to abide by the terms or conditions of the UFA or applicable regulations, are directed to the franchisee, and the franchisee is responsible for addressing those issues with the relief driver. Similarly, if SuperShuttle or a regulatory body has an issue with a franchisee's van or how the van is being used, SuperShuttle will speak with the franchisee, not the relief driver, and the franchisee is responsible for addressing those issues.

III. ANALYSIS

As previously stated, there are two issues presented based upon SuperShuttle's arguments at hearing and in brief, either of which could be dispositive: (1) whether SuperShuttle met its burden to show the petitioned-for unit includes independent contractors, and not employees under Section 2(3) of the Act; and (2) whether Supershuttle met its burden to establish that franchisees are statutory supervisors under Section 2(11) of the Act?

I find that, even if I assume that franchisees are not independent contractors, they are supervisors as defined in Section 2(11) of the Act. In as much as a majority of the petitioned-for unit is comprised of statutory supervisors, and Petitioner has not agreed to proceed to an election in a unit other than that petitioned-for, I shall dismiss the petition.

Section 2(11) of the Act defines as "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

These powers are to be read in the disjunctive, and possession or one or more of them does not convert an employee into a Section 2(11) supervisor unless the exercise of those powers is not of a merely routine or clerical nature, but requires the use of independent judgment. *Adco Electric Inc.*, 307 NLRB 1113, 1120 (1992). Section 2(11) requires that the purported supervisor has the

¹⁰ In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board adopted a definition of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise....professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare, Inc.*, *Id.* at 693. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "not of a merely routine or clerical nature." *Id.* at 694. Consistent with the view of the Supreme Court, the Board held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* (citation omitted). However, "...the mere existence of company

authority to (or effectively recommend the) hire, transfer, suspend, lay off, recall, promote, discharge, assign, responsibly direct, adjust grievances, reward, or discipline *other employees*.

In a previous decision arising out of this Region in Case 05-RC-016601, the Acting Regional Director found the relief drivers utilized by SuperShuttle franchisees providing transportation service for a different airport, Baltimore-Washington International Thurgood Marshall Airport, to be Section 2(3) employees. ¹¹ That decision then proceeded to find franchisees to be Section 2(11) supervisors because they could hire, assign, reward, and or discharge relief drivers using their independent judgment. In the present case, in light of the overwhelming evidence that franchisees are Section 2(11) supervisors of the relief drivers, it also possible to assume, without deciding, that relief drivers are also Section 2(3) employees of SuperShuttle without affecting my finding that the petitioned-for unit is inappropriate.

policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.* The Board held as follows on the meaning of "independent judgment":

To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term. "Independent" means "not subject to control by others." Webster's Third New International Dictionary 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." Webster's Third New International Dictionary 1223 (1981). Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

Oakwood Healthcare, Inc., Id. at 695.

¹¹ His findings in that decision read: "Based upon the record, I conclude that the relief drivers are Section 2(3) employees. While the franchisees can operate without relief drivers, the witnesses who testified relied heavily on their relief drivers in order to effectively operate their franchises. Similarly, the relief drivers are dependent on the franchisee because they cannot operate a Super Shuttle van without being covered under a unit franchisee agreement. Furthermore, each relief driver's schedule, wage, and other terms and conditions of employment are determined primarily by the needs of the franchisee for whom he/she is working. The relief drivers are subject to and must abide by the same policies and regulations applicable to the franchisee drivers, as well as any additional rules or policies the franchisee adopts. The franchisee supplies the franchise, the van, the Nextel phone, and the reservation system. Without those items, the relief driver would not be able to provide shared-ride services under the lease and concession agreement. And, in contrast to the Petitioner's contention that these relief drivers are temporary or casual employees, the record reflects that most of the relief drivers work as such on a regular basis (from a couple of hours a week to 50-80 hours a week), and that most of the relief drivers have done so for months or years. While some of the relationships may be for limited periods of time, most appear to be open-ended. Of course, there are certain factors favoring finding that the relief drivers are independent contractors, such as that a few of the relief drivers work for multiple franchisees, several franchisees do not appear to deduct or pay state or federal withholdings, workers compensation insurance, unemployment insurance for the relief drivers, etc. Overall, however, I conclude the evidence establishes they are Section 2(3) employees."

Franchisees are free to hire relief drivers, provided the relief drivers meet the same eligibility requirements to drive as are applicable to franchisees. Many franchisees use relief drivers to enable their franchise to operate 24 hours, to keep their franchise operating if the franchisee goes on vacation, and/or if the franchisee owns multiple franchises. Franchisees make the decision to hire relief drivers independently, without SuperShuttle's involvement. While SuperShuttle may provide franchisees with the names of candidates who are interested in being relief drivers, the decision of who to hire remains solely with the franchisee. There is no dispute that SuperShuttle does not obligate any franchisee to hire a specific relief driver. SuperShuttle's role in the hiring process is exclusively to ensure that relief drivers meet driver licensure, certification, and training requirements set forth by WMAA, WMATC, and DOT. A franchisee is only required to provide SuperShuttle with basic information regarding the relief driver, as well as documentation showing that he/she meets the above-referenced requirements.

I further find it significant that individual franchisees make different decisions regarding how to hire and employ relief drivers. Some franchisees employ one relief driver per van in order to maximize revenue; other franchisees use multiple relief drivers per van in order to maximize the van usage. Still other franchisees opt not to assume the responsibility and potential costs of another driver and avoid using relief drivers. Franchisees use their independent judgment in deciding whether to hire relief drivers. Moreover, beyond ensuring relief drivers meet the basic qualifications to drive a SuperShuttle van per the UFA and the concession contracts, SuperShuttle is generally not involved in the process by which franchisees recruit relief drivers. Franchisees may recruit relief drivers through friends, families, and other sources, and are in no way required or compelled to search for relief drivers through SuperShuttle.

Should a franchisee hire a relief driver, it is up to the franchisee to decide how much the relief driver will be paid, the manner of payment, and whether the relief driver will be responsible

for any of the costs associated with the franchise. Sometimes the arrangement between a franchisee and their relief driver will be a subject of negotiation between them, while in other situations the franchisee will make the decision. In either case, SuperShuttle is not involved. Franchisees may choose to split costs and revenues equally with relief drivers. Alternatively, they may allow a relief driver to operate a van exclusively and keep most of the revenues provided they pay all the costs. Franchisees and their relief drivers may also reach different manners of arrangement on other costs, such as having franchisees pay for their relief drivers' training, or loaning their relief drivers money for van repairs, or pay them in advance.

Franchisees also determine if and when their relief driver(s) will work, and therefore control the manner of employment, further exercising indirect control over relief drivers' earnings. Some franchisees allow their relief drivers to work their own schedules, while other franchisees have oncall relief drivers for when that franchisee takes time off. Whatever the arrangements covering terms and wages of employment, however, SuperShuttle issues one check to the franchisee (or their incorporated entity). The franchisee remains solely responsible for making sure their franchise is in compliance with all applicable laws and regulations; should a relief driver commit a violation, responsibility for it still falls upon the franchisee.

Franchisees may also terminate a relief driver at any point, also without SuperShuttle's input. Whether franchisees give their respective relief drivers an opportunity to correct any deficiencies is entirely up to the franchisees. While SuperShuttle may suggest a franchisee terminate a relief driver who repeatedly violates the terms of the UFA, SuperShuttle has no authority to terminate the relief driver and its actions are only against the franchisee, who is ultimately responsible for ensuring a franchise's compliance.

In sum, I find that the evidence presented is sufficient to find that, even assuming that the petitioned-for franchisees are not independent contractors, SuperShuttle nevertheless met its burden

and established that franchisees are supervisors as defined in Section 2(11) of the Act. Because a majority of individuals in the petitioned-for unit are franchisees, whom I find to be statutory supervisors, and, as indicated above, Petitioner did not express a desire to proceed to an election in a unit limited to relief drivers, I dismiss the petition.

IV. ORDER

IT IS HEREBY ORDERED that the petition filed in this case is dismissed.

V. RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street NW, Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business on December 11, 2013, unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern

Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown,

the Board may grant special permission for a longer period within which to file.¹² A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under the Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Issued at Baltimore, Maryland this 27th day of November 2013.

(SEAL)

1s/ Wayne R. Gold

Wayne R. Gold, Regional Director National Labor Relations Board, Region 5 Bank of America Center - Tower II 100 South Charles Street – Suite 600 Baltimore, Maryland 21201

¹² A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.